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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LIBBEY-OWENS-FORD COMPANY,

Petitioner,

vs.

SHERRY EIRHART and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 12, 1980 (no Petition for Rehearing was filed).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (A. 1a-9a) is reported in 22 FEP Cases 13. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (A. 10a-22a) is reported at 482 F.Supp. 357 (N.D. Ill. E.D. 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1980, and this Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a consent order entered in a Title VII action between an employer and the EEOC, such as the February 3, 1971 Consent Order entered in the case of *United States v. Libbey-Owens-Ford Company, Inc., et al.*, 3 E.P.D. Sec. 8052 (1971), 3 E.P.D. Sec. 8122 (1971, Overruling Objections To Consent Decree), constitute an interpretation or opinion of the EEOC and, therefore, provide the employer immunity under Sec. 713(b) of Title VII?

2. May a Court of Appeals decide that a consent order entered into between a governmental agency and a defendant cannot be an opinion of the governmental agency that the actions directed in the consent order are in conformance with the statute under which the action was brought, contrary to this Court's decisions in *U.S. v. Armour & Co.*, 402 U.S. 673 (1971) and *U.S. v. I.T.T. Continental Baking Co.*, 420 U.S. 223 (1975)?

3. May a Court of Appeals decide that a consent order constituting an interpretation or opinion of the EEOC under Sec. 713(b) of Title VII does not provide immunity against all claimants or outside of the geographical area described therein, contrary to this Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and the affirmance by the Third Circuit in *EEOC v. American Tel. & Tel. Co.*, 419 F.Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 713(b) of Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b) (1976), provides, in pertinent part:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, . . . Such a defense, if established, shall be a bar to the action or proceeding . . . .

Section 705 of Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1964), provided in pertinent part:

> Equal Employment Opportunity Commission.
>
> . . .
>
> (g) Powers of Commission.
>
> The Commission shall have power—
>
> . . .
>
> (6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 2000e-5 of this title, or for the institution of a civil action by the Attorney General under section 2000e-6 of this title, and to advise, consult, and assist the Attorney General on such matters.

Section 707 of Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(d) (1972), provides:

> (d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced

> pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

29 C.F.R. Sec. 1601.30, 30 Fed. Reg. 8409 (1965), provided:

> Only (a) a letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the FEDERAL REGISTER may be considered a "written interpretation or opinion of the Commission" within the meaning of section 713 of Title VII.

29 C.F.R. Sec. 1601.33, 44 Fed. Reg. 4430 (1979), provides:

> Section 1601.33 Issuance of interpretation or opinion.
>
> Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:
>
> (a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or
>
> (b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or
>
> (c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10(a) or (b) of the Commission's Guidelines on Affirmative Action, 29 C.F.R. Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

STATEMENT OF THE CASE

On March 12, 1968, the Equal Employment Opportunity Commission (EEOC) commenced an investigation of Libbey-Owens-Ford's (LOF) Toledo Plant 8 based upon a charge of sexual discrimination in hiring and seniority practices contained in collective bargaining agreements between LOF and the United Glass and Ceramic Workers of North America, AFL-CIO-CLC Union. After conducting its investigation, the EEOC began conciliation proceedings with LOF. On February 4, 1970, during the course of this conciliation and pursuant to the requirement of the Office of Federal Contract Compliance Programs (OFCCP), LOF began utilizing written minimum physical and non-physical hiring standards in its Toledo, Ohio facilities, including a height standard of 5'4" and a weight standard of 130 lbs. The conciliation between the EEOC and LOF was subsequently terminated, and on March 13 and March 19, 1970, the EEOC notified LOF that the EEOC had referred the matter to the U.S. Department of Justice with a recommendation for the institution of a civil action under Sec. 707 of Title VII of the Civil Rights Act of 1964. This referral from the EEOC to the U.S. Department of Justice (U.S. Attorney General) was made pursuant to the EEOC's power, granted under Sec. 705(g)(6) of Title VII of the Civil Rights Act of 1964, to refer matters to the Attorney General for the institution of a civil action by the Attorney General under Sec. 707 of the Civil Rights Act as well as to advise, consult and assist the Attorney General on such matters.

Following investigation of LOF's Plant 8, the U.S. Department of Justice, on July 20, 1970, filed a complaint against LOF in the United States District Court for the Northern District of Ohio, Western Division, alleging that LOF had a discriminatory policy with regard to hiring women in its Toledo, Ohio facilities based upon the collective bargaining agreements. During the course of this litigation, LOF's minimum physical and non-physical hiring standards, including the 5'4" height standard and 130 lbs. weight standard, were submitted to and approved by the U.S. Department of Justice, except that the minimum weight standard was lowered to 110 lbs. at the direction of the U.S. Department of Justice. In December, 1970 these same minimum physical and non-physical hiring standards were put into effect in LOF's Ottawa, Illinois facility. These same minimum physical and non-physical hiring standards were then incorporated by the parties into a Consent Order on February 3, 1971. The Consent Order, in paragraph XI A, specifically directs that the minimum physical and non-physical requirements for entry level jobs which were in writing as of February 4, 1970 shall continue to be applicable to both males and females seeking employment with LOF, except that the minimum weight requirement shall be 110 lbs. On February 3, 1971, the District Court found that the Consent Order was valid and entered it as the Order of the Court. *U.S. v. Libbey-Owens-Ford Co., Inc., et al.*, 3 E.P.D. Sec. 8052 (1971) and 3 E.P.D. Sec. 8122 (1971, Overruling Objections To Consent Decree).

Following the entry of the February 3, 1971 Consent Order, the EEOC investigated two charges of discrimination brought against LOF based upon its use of the 5'4" minimum height standard. In response to both

charges, the EEOC issued "not reasonable cause" decisions on October 29, 1973 and March 15, 1974. The EEOC determined in those "not reasonable cause" decisions that "documented evidence reveals that Respondent [LOF] was ordered by Court Civil Action No. C-70-212 [*U.S. v. Libbey-Owens-Ford Co., Inc., et al., supra*] to reduce the minimum weight standard . . . to 110 lbs., but the height standard . . . was allowed to remain at 5'4" as written in Minimum Hourly Employment Standards as of February 4, 1970", and that based on this determination there was "not reasonable cause" to believe that LOF discriminated against the two women who filed the charges with the EEOC.

On November 20, 1974, on motion of the EEOC and as directed by Sec. 707(d) of Title VII, 42 U.S.C. Sec. 2000e-6(d) (1972), the EEOC substituted as party plaintiff for the United States in the original suit (Civil Action No. C-70-212, United States District Court for the Northern District of Ohio, Western Division). Since that time, the EEOC has taken no action whatsoever, even after reviewing in the summer of 1977 all the records that LOF is required to maintain in accordance with paragraph XIII, sub-paragraph A of the Consent Order, to modify in any way the February 3, 1971 Consent Order.

Subsequent to the entry of the February 3, 1971 Consent Order, LOF included within its Affirmative Action Programs for all of its glass plants nationwide, the 5'4" height standard and the 110 lbs. weight standard directed in the Consent Order. The Office of Federal Contract Compliance Programs (OFCCP) and its Compliance Agencies have consistently approved for the entire eight years since the Consent Order was entered, these Affirmative Action Programs, all of

which include the 5′4″ height standard and the 110 lbs. weight standard as directed in the Consent Order.

Lower court proceedings

On August 31, 1976, respondent Sherry Eirhart filed her action against LOF in the U.S. District Court for the Northern District of Illinois, Eastern Division, alleging that LOF discriminated against her by maintaining an arbitrary 5′4″ height standard at its Ottawa, Illinois plant. On May 24, 1978, respondent EEOC filed its Complaint alleging that LOF's height and weight "restrictions" at its Ottawa, Illinois plant violated Title VII. The Eirhart and EEOC suits were thereafter consolidated for purposes of discovery and trial.

LOF filed motions for summary judgment in both the Eirhart and EEOC actions, and the EEOC filed a motion for summary judgment in its action, also. The U.S. District Court for the Northern District of Illinois, Eastern Division, granted LOF's motion for summary judgment in both suits holding: (1) that the February 3, 1971 Consent Order constituted a written interpretation or opinion of the EEOC within the meaning of the immunity set forth in Title VII, Sec. 713(b), 42 U.S.C. Sec. 2000e-12(b); (2) that LOF was justified in relying on the Consent Order in utilizing its height and weight standards; and (3) that the Consent Order, therefore, provides a defense to LOF in the Eirhart and EEOC actions.

The Court of Appeals for the Seventh Circuit reversed the trial court and remanded the case for trial.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT. THAT QUESTION IS: DOES A CONSENT ORDER ENTERED IN A TITLE VII ACTION BETWEEN AN EMPLOYER AND THE EEOC, SUCH AS THE FEBRUARY 3, 1971 CONSENT ORDER, CONSTITUTE AN INTERPRETATION OR OPINION OF THE EEOC AND, THEREFORE, PROVIDE THE EMPLOYER IMMUNITY UNDER SEC. 713(b) OF TITLE VII?

The Court of Appeals reversed the District Court's decision that the February 3, 1971 Consent Order was a "written interpretation or opinion" of the EEOC under Sec. 713(b) and that LOF was immune from the actions brought by Eirhart and the EEOC pursuant to Title VII, Sec. 713(b), 42 U.S.C. Sec. 2000e-12(b). The Court of Appeals' reversal of the District Court's decision is a ruling on a question of federal law important not only to LOF, but also to all employers entering into and operating under consent decrees with the EEOC in Title VII actions.

The Court of Appeals has held that an employer's employment practices, even though initiated at the direction of the OFCCP and conforming with the provisions of a consent order previously entered into with the EEOC, still subject the employer to employment discrimination actions, by the same governmental agency or any other person, based on the very same, previously approved employment practices. This illogical and

unreasonable extension of liability is contrary to Title VII, Sec. 713(b). The decision by the Court of Appeals places such employers in a predicament for it provides authority for the EEOC or any other person to bring suits against employers, alleging that even though the employers are conforming their employment procedures to the provisions of consent orders entered into with the EEOC, such conduct does not bring the employers in conformance with Title VII.[1] Obviously, this is an important question of federal law affecting employers throughout the country, and it is respectfully submitted that this Court should decide the issue after granting the Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

THE CONSENT ORDER OF FEBRUARY 3, 1971 IS AN INTERPRETATION OR OPINION OF THE EEOC UNDER TITLE VII, SEC. 713(b), AND THEREFORE PROVIDES LOF WITH IMMUNITY.

A. The Consent Order Is An Interpretation Or Opinion.

Sec. 713(b) of Title VII provides that no person shall be subject to any liability or punishment for or on account of the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in

[1] The Consent Order of February 3, 1971 requires LOF to use the 5'4" height requirement and weight requirement. If the immunity granted by the Consent Order is removed, the obvious result would be that LOF would be bound by inconsistent and contradictory judgments. First, LOF would still be bound by the Consent Order to use the 5'4" height standard and weight standard. Then, if the immunity granted by the Consent Order is denied in the case at bar, this could result in LOF being bound by a second, contradictory judgment requiring them not to use the 5'4" height requirement and weight requirement.

conformity with, and in reliance on *any* written interpretation or opinion of the Commission. 42 U.S.C. Sec. 2000e-12(b).

The February 3, 1971 Consent Order is a written interpretation or opinion for several reasons. First, it is a written agreement entered into by the U.S. Department of Justice on behalf of the EEOC in open court, approving LOF's minimum hiring height and weight standards. Second, it was adopted by a United States District Court as a final order, binding the parties thereto. As such, the Consent Order reflects the considered legal judgment of both the U.S. Department of Justice and the United States District Court that the height and weight standards are fully consistent with Title VII. Third, it is a formal opinion, approved and entered by the District Court as an adjudication on the merits (*Securities & Exchange Commission v. Thermodynamics, Inc.*, 319 F.Supp. 1380, 1382 (D.C. Colo. 1970), *aff'd*, 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973)) and published in a case reporter which reports the full official text of leading federal and state decisions (3 E.P.D. Sec. 8052 (1971) and 3 E.P.D. Sec. 8122 (1971, Overruling Objections To Consent Decree)).

In *Equal Employment Opportunity Commission v. American Tel. & Tel. Company*, 419 F.Supp. 1022, 1037 (E.D. Pa. 1976), *aff'd.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), a consent order to which the EEOC, the Department of Labor and A. T. & T. were parties was approved. In that case, the seniority override provision of the consent order was being challenged by certain unions. In response to this challenge, the court stated that the EEOC, the agency charged with the enforcement of Title VII, and the Department of Labor, the agency charged with the

implementation of Executive Order No. 11246, were parties to the consent decree and obviously judged the relief provided in the decree and the proposed order to be fully consistent with Title VII and the Executive Order respectively, and that their judgment should not be disregarded by the courts. *EEOC v. American Tel. & Tel. Company, supra,* 419 F.Supp. at 1037.

Similarly, in this case, the U.S. Department of Justice, the federal agency which at the time was charged with the enforcement of Title VII, was a party to the Consent Order of February 3, 1971 (the EEOC is now a party to the February 3, 1971 Consent Order). The U.S. Department of Justice judged the relief provided in the Consent Order of February 3, 1971 to be fully consistent with Title VII since it did not join in any objections to the Consent Order either at its initial entry or upon entry of the District Court's decision overruling objections to the Consent Decree, *United States v. Libbey-Owens-Ford Company, Inc., et al.,* 3 E.P.D. Sec. 8052 (1971) and 3 E.P.D. Sec. 8122 (1971, Overruling Objections To Consent Decree). Its judgment should not be disregarded by the courts.

29 C.F.R. Sec. 1601.30 (now 29 C.F.R. Sec. 1601.33) states that only the types of written interpretations or opinions set forth therein constitute an interpretation or opinion of the EEOC.[2] In this case, the Court of Appeals

[2] The EEOC's present policy, embodied in its current Affirmative Action Guidelines, 29 C.F.R. Sec. 1608 *et seq.* (January 19, 1979), Sec. 1608.8, entitled Adherence to Court Order, is that "The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." It should be further noted that Sec. 1608.2 of the EEOC Affirmative Action Guidelines states that the guidelines themselves constitute a "written interpretation or opinion" of the EEOC as that term is used in Sec. 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended.

found 29 C.F.R. Sec. 1601.30 merely persuasive and not controlling because ". . . Congress, in adopting Title VII, did not specifically give the EEOC authority to promulgate interpretative regulations under that Title." (A. 5a-6a). Court decisions have broadened what constitutes an interpretation or opinion under Title VII, Sec. 713(b).

In *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763, 768, n.1 (C.D. Cal. 1977), the court held that a letter of the EEOC was an interpretation or opinion of the EEOC under Title VII, Sec. 713(b), even though the letter itself did not expressly conform to the requirements of 29 C.F.R. Sec. 1601.30. The letter in *Yott* was not addressed to the corporation seeking its protection and was not published in the Federal Register, but was released for publication by the EEOC to the Bureau of National Affairs and Commerce Clearing House, publishing firms devoted to the dissemination of current legislative, administrative and judicial actions.

Other cases interpreting 29 C.F.R. Sec. 1601.30 stress the underlying policy concerns of that Section which are: (1) that a broader reading of 29 C.F.R. Sec. 1601.30 might bind the EEOC to informal or unapproved opinions volunteered by a member of its staff and (2) that 29 C.F.R. Sec. 1601.30 insures that interpretations and opinions are to be based upon either a solid factual foundation or upon the most thorough consideration of the potential factual situations to which the rule might apply. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1200 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); and *Local 189, United Papermakers & Paperworkers v. United States*,

416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). In the *Sprogis* case the Seventh Circuit held that an EEOC internal agency memorandum was not an interpretation or opinion because the memorandum in that case did ". . . not indicate a considered legal judgment approving the policy under the Act." *Sprogis v. United Air Lines, Inc., supra*, 444 F.2d at 1201.

In its decision in this case, the Court of Appeals recognized the comprehensive nature of the Consent Order of February 3, 1971, but then came to a most inconsistent conclusion. The Court of Appeals held that because the Consent Order was so comprehensive they could not "agree" that it involved careful consideration by the government of the height and weight standards (A. 8a-9a). To the contrary, the lowering of the weight standard from 130 lbs. to 110 lbs. at the direction of the U.S. Department of Justice shows that the standards were thoroughly and carefully considered. It is clear that the February 3, 1971 Consent Order comports with the reasoning and holdings of the *Sprogis*, *Local 189* and *Robinson* decisions because it is a formal, written agreement entered into by counsel in open court and is an adjudication on the merits as approved by the court. Furthermore, it represents the considered legal judgment of both the U.S. Department of Justice on behalf of the EEOC (*EEOC v. American Tel. & Tel. Co., supra*, 419 F.Supp. at 1037) and of the District Court approving the Consent Order, that the height and weight standards are consistent with Title VII. It does not, therefore, bind the EEOC to an informal or unapproved opinion "volunteered" by its staff. Rather, it reflects a thorough consideration, after five months of litigation and negotiation between the U.S. Department of Justice and LOF, of the potential situations to which it will apply in LOF employment

procedures. It is, therefore, an interpretation or opinion that the employment practices directed therein, including the minimum physical and non-physical hiring standards, are in conformance with Title VII. Certainly, the U.S. Department of Justice on behalf of the EEOC would not agree to acts which are unlawful.

The case of *EEOC v. American Tel. & Tel. Company, supra,* holds that a consent order and its accompanying documents constitute an interpretation or opinion of the EEOC. The February 3, 1971 Consent Order as a formal written agreement entered into in open court and adopted by the District Court as binding on all the parties also constitutes an interpretation or opinion of the EEOC. It eliminates the danger of the EEOC being bound to an informal or unapproved opinion "volunteered" by a member of its staff. The fact that there is no Memorandum of Agreement or "Opinion Letter" present with regard to the Consent Order of February 3, 1971, as in *EEOC v. American Tel. & Tel. Co.*, does not prohibit the application of the theory of that case to this case. As the district court held in this case, "even more than an 'opinion letter,' an agreement to a consent order by the EEOC represents a formal agency approval of the policies embodied in the order" (A. 16a).

B. The Consent Order Is Of The EEOC.

Following the EEOC's investigation (started in March, 1968), their subsequent negotiations and failed conciliation of the discrimination charges at LOF's Toledo, Ohio plant, the EEOC referred the case to the U.S. Department of Justice with a recommendation that litigation be started. This referral was made pursuant to the EEOC's statutory authority to refer matters to the At-

torney General with a recommendation ". . . for the institution of a civil action by the Attorney General under section 2000(e)-6 of this title, and to advise, consult, and assist the Attorney General on such matters." (Sec. 705(g)(6) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-4(g)(6); EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, pp. 1010, 3005, 3018.) The U.S. Department of Justice (Attorney General) then filed suit against LOF. The Consent Order of February 3, 1971 resulted from subsequent negotiations between the U.S. Department of Justice as attorney for, and on behalf of the EEOC, and LOF.

The EEOC has never questioned, for the eight years the Consent Order has been in effect, the authority of the U.S. Department of Justice to enter into the Consent Order on its behalf. Additionally, the EEOC has never attempted to re-open the Consent Order and, in fact, admitted at page 22, n.11 of its Brief in the Court of Appeals that it was bound by the February 3, 1971 Consent Order.

Under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Sec. 707(d), the function of the Attorney General (U.S. Department of Justice) to bring actions for pattern or practice discrimination was transferred completely to the EEOC. 42 U.S.C. Sec. 2000e-6(d) specifically provides that upon the transfer of this function, in all suits commenced prior to the date of transfer, all court orders and decrees shall remain in effect and the EEOC shall be substituted as a party for the United States of America. This language of Section 707(d) clearly shows that Congress intended for court orders entered into by the U.S. Department of Justice on behalf of the EEOC to be court orders of the EEOC.

The EEOC has ratified the Consent Order of February 3, 1971. Since November 20, 1974 when the EEOC was substituted as party plaintiff in the case of *United States v. Libbey-Owens-Ford Co., Inc., et al., supra,* it has taken no action whatsoever, even after reviewing in the summer of 1977 the voluminous records that LOF was and is required to maintain in accordance with paragraph XIII, sub-paragraph A of the Consent Order, to remove, modify or change either the Consent Order in its entirety or the minimum physical hiring standards of 5′4″ height and 110 lbs. weight. This inaction by the EEOC itself constitutes acquiescence to the terms of the Consent Order. See *United States v. Atlantic Refining Company,* 360 U.S. 19 (1959), wherein this Court held that where a governmental agency failed to challenge portions of a consent decree for a period of years, it acquiesced in those consent order terms. Additionally, the EEOC has issued two "not reasonable cause" decisions based upon the Consent Order. The EEOC issued these "not reasonable cause" decisions on two separate occasions subsequent to the entering of the Consent Order, when two individuals filed charges against LOF alleging discrimination in its Toledo, Ohio plant because of LOF's use of the 5′4″ minimum height standard. The EEOC determined on October 29, 1973 and March 15, 1974 that the February 3, 1971 Consent Order allowed the 5′4″ minimum height standard to remain and that, therefore, there was not reasonable cause to believe that LOF discriminated against the two charging parties.

C. The Consent Order Provides LOF With Immunity.

Clearly, the February 3, 1971 Consent Order is not only an interpretation or opinion under Title VII, Sec. 713(b); it is also an interpretation or opinion of the

EEOC. It, therefore, provides complete immunity to LOF against the Eirhart and EEOC suits under Sec. 713(b). The Court of Appeals decision, however, subjects LOF to these causes of action which are based on the very employment procedures mandated in that Consent Order. These procedures were judged by the U.S. Department of Justice to be in conformance with Title VII, were ratified by the EEOC, and, as part of LOF's Affirmative Action Programs in all of its glass plants throughout the United States, were continuously approved by the Office of Federal Contract Compliance Programs (OFCCP) and its Compliance Agencies, after thorough reviews, for the entire eight years since the Consent Order was entered. This Court should review this decision not simply because of its effect on LOF but because of its effect on all employers who have entered into consent decrees with the EEOC.

II.

THE COURT OF APPEALS HAS DECIDED THAT A CONSENT ORDER, SUCH AS THE CONSENT ORDER OF FEBRUARY 3, 1971, CANNOT BE DEEMED TO BE AN "OPINION" OF THE GOVERNMENTAL AGENCY THAT THE ACTIONS DIRECTED IN THE CONSENT ORDER ARE IN CONFORMANCE WITH THE STATUTE UNDER WHICH THE ACTION WAS BROUGHT BECAUSE A CONSENT ORDER IS A COMPROMISE AND PRODUCT OF BARGAINING SKILL BETWEEN TWO PARTIES. THIS DECISION IS CONTRARY TO THE HOLDINGS OF THIS COURT IN *U.S. v. ARMOUR & CO.*, 402 U.S. 673 (1971) AND *U.S. v. ITT CONTINENTAL BAKING CO.*, 420 U.S. 223 (1975).

The Court of Appeals decided that the February 3, 1971 Consent Order could not be construed to be an opinion because it was a compromise and a product of bargaining skills between the U.S. Department of Justice and LOF. In so deciding, the Court of Appeals

quoted the following language of this Court's opinion in *U.S. v. Armour & Co.*, 402 U.S. 673, 681-682 (1971):

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."

Despite the Court of Appeals' reliance on *U.S. v. Armour & Co., supra*, its decision is contrary to both the language cited and the holding of that case. Additionally, the Court of Appeals' decision is contrary to the holding of this Court in *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223 (1975).

This Court held in *U.S. v. Armour & Co.* and *U.S. v. ITT Continental Baking* that what action was prohibited by prior consent decrees must be ascertained from the four corners of the decrees themselves without reference to the purposes of the antitrust statute. *U.S. v. Armour, supra*, 402 U.S. at 682; *U.S. v. ITT Continental Baking Co., supra*, 420 U.S. at 237. This holding, that it is inappropriate to search for the "purpose" of a consent decree and the laws allegedly violated, was in response to a government agency's argument that acts not included in

a prior consent decree were prohibited by a prior consent decree.

Under the Court of Appeals' decision, a government agency could always argue that the very actions mandated by the four corners of a consent order never bring a defendant in conformance with Title VII provisions. This is clearly erroneous and contrary to the holdings of the *ITT Continental* and *Armour* cases. The *Armour* case held:

> "Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

U.S. v. Armour & Co., supra, 402 U.S. 682. In other words, if a party's actions come within the four corners of a consent decree those actions would fulfill not only the purpose of the government in bringing the prior action which resulted in the consent decree but also the purpose of the law under which the original action was brought.

To decide otherwise, as the Court of Appeals has done, would mean that no employer will ever be assured that conforming his actions to the terms of a consent decree, previously entered in a suit brought by the government to enforce Title VII provisions, will ever result in his actions being consistent with Title VII. This clearly poses a very real dilemma for employers. The entry of future consent decrees will obviously be discouraged. One commentary has already forecast this situation based on the Court of Appeals decision herein. See Equal Employment Compliance Manual (1978), Callaghan and Com-

pany, Equal Employment Compliance Update, Vol. 3, No. 7, p. 70, March 1980. It is

> ". . . surely . . . incongruous . . . [that] the use of congressionally preferred means [cooperation and voluntary compliance resulting in a consent order] to achieve a Congressionally desired result would leave that result vulnerable to attack on the ground that the Congressional intent had been violated." *EEOC v. American Tel. & Tel., supra,* 419 F.Supp. at 1039.

III.

THE COURT OF APPEALS, BY RULING THAT A CONSENT ORDER, SUCH AS THE CONSENT ORDER OF FEBRUARY 3, 1971, DOES NOT PROVIDE IMMUNITY UNDER TITLE VII, SEC. 713(b) EITHER AGAINST A CLAIMANT WHO WAS NOT A PARTY OR IN PRIVITY WITH A PARTY TO THE CONSENT ORDER OR OUTSIDE THE GEOGRAPHICAL AREA DESCRIBED THEREIN, HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S DECISION IN *ALBEMARLE PAPER CO. v. MOODY,* 422 U.S. 405 (1975) AND THE AFFIRMANCE BY THE THIRD CIRCUIT IN *EEOC v. AMERICAN TEL. & TEL. CO.*

Sec. 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-12(b)(1) provides immunity to a person if that person pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. Sec. 713(b) further states that such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, the interpretation or opinion is modified, rescinded or determined by judicial authority to be invalid or of no legal effect.

There are no limitations against whom the Sec. 713(b) immunity can be asserted. Sec. 713(b) obviously does not limit its immunity to the claims of particular potential claimants nor to any specific geographical area. The fact that an individual is not a party to a consent order which constitutes an interpretation or opinion of the EEOC has no effect on the immunity provided by the consent order. Complete immunity, without any restrictions as to geographical area, is provided by Sec. 713(b) against any and all potential plaintiffs. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 423, n.17 and *EEOC v. American Tel. & Tel., supra,* 419 F.Supp. at 1055, n.34.

Albemarle holds that the immunity provided in Sec. 713(b) is complete, and speaks of narrowness only as it reflects that a defense must be within Sec. 713(b) to be a "good faith" defense. *Albemarle Paper Co. v. Moody, id.* According to *Albemarle,* "good faith" is not a defense to a Title VII action except under Sec. 713(b). However, Sec. 713(b) provides complete immunity. *Albemarle Paper Co. v. Moody, id.* Therefore, where the action complained of has not only been approved but also ordered in a consent decree constituting an interpretation or opinion, that decree provides immunity for the defendant against actions of all potential plaintiffs, including those not a party to the initial decree. *EEOC v. American Tel. & Tel., supra.*

In *EEOC v. American Tel. & Tel., supra,* it was recognized that the seniority override utilized as part of the defendant's Affirmative Action Plan may have had adverse economic consequences on those employees of the defendant who were passed over by use of the seniority override. Employees passed over would not have been parties to the original consent decree. Nevertheless, the court found that the consent decree

provided real, complete immunity to the defendant for its actions taken in good faith reliance on its seniority override provision against claimants not parties to the original consent decree. *EEOC v. American Tel. & Tel. Co., supra,* 419 F.Supp. at 1055, citing *Albemarle Paper Co. v. Moody, supra.* Therefore, as an interpretation or opinion of the EEOC, the February 3, 1971 Consent Order provides immunity to LOF against all potential plaintiffs, even those, such as Eirhart, not parties or privies to the consent order.

The EEOC procedural regulations themselves, 29 C.F.R. Secs. 1601.28-1601.30 (now 29 C.F.R. Secs. 1601.31-1601.33) do not require that potential claimants be named and identified in a document in order for it to constitute an interpretation or opinion providing immunity under Sec. 713(b). All three types of documents designated in 29 C.F.R. Sec. 1601.33 (1979) could affect un-named and un-identified potential claimants who would not be party to nor in privity with a party to the document. Yet, complete immunity would still be available to the defendants acting under such 29 C.F.R. Sec. 1601.33 documents.

The Court of Appeals decided that the Consent Order of February 3, 1971 did not provide immunity against Eirhart, someone not a party nor in privity with a party to the Consent Order, because any legal effect of the Consent Order of February 3, 1971 would be unrelated to Sec. 713(b) and relevant only to *res judicata* or collateral estoppel (A. 8a). The Court of Appeals further decided that the effect of the Consent Order of February 3, 1971 was specifically limited to the geographical area mentioned in the Consent Order (A. 8a).

The cases cited by the Court of Appeals (A. 8a) in support of its decision are distinguishable. They involved

plaintiffs who brought suit seeking relief from practices which had not been approved and ordered to be utilized in an earlier consent decree. In those cases, unlike the Eirhart and EEOC suits, the plaintiffs sought either additional or different relief from the same practices for which relief was given in the initial consent decree or relief from practices different from those covered or even mentioned in the initial consent decree. None of those cases involved a situation, like the instant cases, wherein the individual plaintiffs sought relief from conduct specifically described in, approved by, and ordered in the initial consent decrees.

Where a consent order provides immunity under Sec. 713(b), as the February 3, 1971 Consent Order provides to LOF, complete immunity is provided against whomever is affected by the practice or procedure contained in the consent order. This is true whether the person affected is named or un-named in the consent order or whether the person affected is neither a party to nor in privity with a party to the consent order. The Consent Order of February 3, 1971, being an interpretation or opinion, provides immunity under Sec. 713(b) against all potential plaintiffs including those such as respondent, Sherry Eirhart.

By reaching the opposite result on this important question of federal law, the Court of Appeals has rendered a decision which is in conflict with this Court's decision in *Albemarle, supra*, and the Third Circuit's affirmance in *EEOC v. American Tel. & Tel. Co., supra.* For this additional reason, this Court should grant the Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

CONCLUSION

For the reasons stated above, the petitioner LOF urges that a Writ of Certiorari should be granted to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Dated: May 12, 1980

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1756
SHERRY EIRHART,

Plaintiff-Appellant,

v.

LIBBEY-OWENS-FORD COMPANY,

Defendant-Appellee.

No. 79-1757
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

LIBBEY-OWENS-FORD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76 C 3182, 78 C 2042—**Stanley J. Rozkowski**, *Judge.*

ARGUED DECEMBER 4, 1979—DECIDED FEBRUARY 12, 1980

Before FAIRCHILD, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and CUDAHY, *Circuit Judge.*

CASTLE, *Senior Circuit Judge.* Plaintiff-appellant Equal Employment Opportunity Commission (EEOC) filed this suit, challenging hiring practices of defendant-appellee Libbey-Owens-Ford Co. (LOF). The EEOC suit was subsequently consolidated with a similar suit filed

by plaintiff-appellant Sherry Eirhart. The district court then granted LOF's motion for summary judgment as to both Eirhart and the EEOC. The basis for the district court's decision was a determination that LOF was immune from any suit under § 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b). We hold that the district court erred in granting LOF immunity from suit and, accordingly, reverse the decision of the district court.

I.

The facts of this case are apparently not in dispute. In 1968 the EEOC received a complaint against, and started investigating, the employment practices at one of the LOF's plants in Toledo, Ohio (plant 8). The complaint alleged the restriction of female employees to two departments containing lower paying jobs and the maintenance of seniority lists which were segregated on the basis of sex. The EEOC then issued a "reasonable cause" letter and entered into conciliation negotiations with LOF. The negotiations failed and the EEOC referred the case to the Justice Department with a recommendation that a civil suit against LOF be instituted.[1] Such a suit was filed, *United States v. Libbey-Owens-Ford Co.*, No. C-70-212 (N.D. Ohio, filed July 20, 1970), and on February 3, 1971 a consent order was entered into by the parties and approved by the United States District Court for the Northern District of Ohio, 3 Emp. Pract. Dec. ¶8052 (1971). The order, which dealt primarily with transfer, promotion, and seniority rights, included a provision concerning height and weight requirements. The provision stated that "[m]inimum physical and non-physical requirements for entry level jobs, which were in writing as of February 4, 1970, shall continue to be applicable to both males and females seeking employment with the Company, except that the

[1] At that time the EEOC did not have the authority to file such a suit. The EEOC's authority was limited to investigation of charges, conciliation and persuasion. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 259-60. Instead, such suits were filed by the Attorney General. *Id.*, § 707, 78 Stat. 261-62.

minimum weight requirement for females shall be 110 pounds." The written physical requirements referred to in the consent order included a minimum height requirement of 5'4".

In December, 1970 hiring standards including a minimum height requirement of 5'4" and a minimum weight requirement of 110 pounds were instituted at LOF's plant in Ottawa, Illinois. In August, 1976 Sherry Eirhart filed a lawsuit challenging the height requirements of the Ottawa plant. *Eirhart v. Libbey-Owens-Ford Co.*, No. 76 C 3182 (N.D. Ill.). In May, 1978 EEOC filed a lawsuit challenging the Ottawa plant's height and weight requirements. *EEOC v. Libbey-Owens-Ford Co.*, No. 78 C 2042 (N.D. Ill.). These suits were consolidated by an order dated September 18, 1978. On June 1, 1979 the district court, in ruling on cross-motions for summary judgment, granted LOF's motions for summary judgment against both Eirhart and the EEOC. Both Eirhart and the EEOC have appealed and jurisdiction of this Court is based on 28 U.S.C. § 1291.

II.

The basis for the district court's opinion is § 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b). That section provides, in pertinent part, that:

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . .

The district court held that LOF was immune from suit under Section 713(b) and that LOF's immunity entitled the company to summary judgment.

In order to reach that conclusion, the district court decided that the Ohio consent decree was indeed a "written interpretation or opinion of the Commission." This proposition misconstrues both Section 713(b) and the nature of consent decrees. As noted by the Supreme Court:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (emphasis in original) (footnote omitted). Such a compromise and product of bargaining skill between two parties cannot be deemed to be an "order or opinion" of either of the parties. It would not be appropriate for this Court to expand the narrowly drawn Congressional grant of immunity contained in Section 713(b) to include such a decree. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 423 n. 17. *See also id.* at 444 (Rehnquist, J., concurring).

Moreover, in granting LOF's motion for summary judgment, the district court chose to ignore the EEOC's regulations concerning Section 713(b). Those regulations, in pertinent part, state that:

> Only the following may be relied upon as a "written interpretation or opinion of the Commis-

sion" within the meaning of Section 713 of Title VII:

> (a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or
>
> (b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or
>
> (c) A Commission determination of no reasonable cause . . . when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

29 C.F.R. § 1601.33 (1979).[2]

In determining whether the district court properly ignored these regulations we take note of the fact that Congress, in adopting Title VII, did not specifically give the EEOC authority to promulgate interpretative regulations under that Title. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Nevertheless, the EEOC is the agency charged with the administration of Title VII and, as such, its interpretations are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424,

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[2] Other relevant regulations provide that:

> § 1601.31 Request for interpretation or opinion.
>
> Any interested person desiring a written interpretation or opinion from the Commission may make a request therefor. However, issuance of such interpretations or opinions is discretionary.
>
> § 1601.32 Contents of request; where to file.
>
> A request for an "opinion letter" shall be in writing, signed by the person making the request, addressed to the Chairman, Equal Employment Opportunity Commission, 2401 E Street N.W., Washington, D.C. 20506, and shall contain:
>
> (a) The names and addresses of the person making the request and of other interested persons.
>
> (a) A statement of all known relevant facts.
>
> (c) A statement of reasons why the interpretation or opinion should be issued.

29 CFR §§ 1601.31, .32 (1979).

433-34 (1971). Accordingly, we view these regulations with the realization that:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration; The validity of its reasoning, its consistency with later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), *quoted in General Electric Co. v. Gilbert*, 429 U.S. at 141-42.

When viewed in this manner these regulations are reasonable and, in this case, persuasive. *See Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1200 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (regulation "reasonably confines reliance justified under Section 713(b) to considered expressions of opinion taking two specifically defined forms"); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (regulation "gives reasonable scope to the statutory provision"). We also note that the EEOC's position on what constitutes a "written interpretation or opinion of the Commission" has remained basically unchanged since the passage of Title VII. 30 Fed. Reg. 8,409 (1965). *See General Electric Co. v. Gilbert*, 429 U.S. at 142-43. Furthermore, expanding Section 713(b) to the case at hand would undermine the EEOC's system for granting immunity under that section. The EEOC's system "simply insures that the only Commission interpretations and opinions which will be given binding effect . . . are those based either upon a solid factual foundation or upon the most thorough considerations of the potential factual situations to which the rule might apply." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). Therefore, we conclude that the district court erred in ignoring the EEOC

guidelines as to what constitutes a "written order or opinion of the Commission" under Section 713(b).

The EEOC also argues that the consent decree simply was not "of the Commission". This argument is based on the fact that the EEOC did not participate in the drafting of the consent decree. Although the EEOC investigated LOF's plant 8, the Commission did not have enforcement powers at that time. Instead, the EEOC was required to refer the case to the Attorney General, under whose auspices the suit was filed and the consent decree entered into. However, the EEOC has been substituted for the Attorney General as a party-plaintiff in the Ohio matter. *EEOC v. Libbey-Owens-Ford Co.*, No. C-70-212 (N.D. Ohio, Nov. 20, 1974) (order granting substitution). The substitution came about when Congress transferred enforcement powers under Title VII from the Attorney General to the EEOC. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107. In light of our rulings on the other issues involved in this case, we need not reach this issue.

III.

LOF raises several arguments in support of the district court's decision. One such argument is based on *EEOC v. Amer. Tel. & Tel. Co.*, 419 F.Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). The argument relies on a footnote in which the district court, in discussing immunity under Section 713(b), stated that: "[t]he Consent Decree and its accompanying documents in the instant case certainly constitute such an interpretation or opinion [of the Commission]." 419 F.Supp. at 1055 n. 34. However, this footnote offers little support for LOF; the documents accompanying the consent decree in the A.T.&T. case included two documents which were entitled "opinion letters," were signed by the General Counsel of the EEOC, and stated that they were written "on behalf" of the EEOC. LOF's Ohio decree had no such accompanying documents and, therefore, the A.T.&T. case is inapposite.

LOF also argues that the Ohio decree is the equivalent of an adjudication on the merits and is binding on both the EEOC and Eirhart. However, LOF fails to explain how Eirhart, who was neither a party to the Ohio case nor in privity with a party, can be bound by the Ohio decree.[3] *See Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1307 (9th Cir. 1977); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1204 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (both cases indicating that Eirhart's ability to sue is not affected by the consent decree between LOF and the EEOC). Moreover, regardless of whether or not the consent decree is binding on the EEOC, that decree is limited, by its terms, to "[h]iring in all Toledo area plants." Additionally, any legal effect of the order on the EEOC would be unrelated to Section 713(b). Rather, such effect would be relevant only to a *res judicata* or collateral estoppel argument. No such argument was set forth in the district court's decision nor is such an argument before us on appeal.

LOF also contends that those interests which Section 713(b) seeks to safeguard were adequately protected under the circumstances surrounding the issuance of the Ohio consent decree. Those interests, according to LOF, are that the EEOC should not be bound by informal or unapproved opinions volunteered by members of the EEOC staff and that EEOC opinions should be based upon a solid factual foundation or on thorough consideration of the issues involved. However, in claiming that these interests have been adequately protected in this case, LOF overlooks the comprehensive nature of the Ohio decree and the compromises inherent in such an agreement. The Ohio decree dealt with a number of practices at LOF's Toledo plants. Indeed, neither the charges filed with the EEOC nor the complaint filed in

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[3] LOF also fails to explain how, if Section 713(b) immunity is available to an employer who enters into a consent decree with the government, several courts of appeals have allowed individual employees to bring suits following such decrees. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

the Ohio lawsuit made any mention of height and weight requirements. Rather, the focus of both the charges and the suit was LOF's seniority and transfer practices. LOF's hiring standards were dealt with in a two paragraph portion of the twenty-one page long consent decree. Therefore, we cannot agree with LOF's contention that the consent decree involved careful consideration by the government of the height and weight requirement.

We have carefully examined the other arguments raised by LOF and do not find them persuasive. Accordingly, the judgment of the district court is

REVERSED, AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHERRY EIRHART and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs,

v.

LIBBEY-OWENS-FORD CO.,

Defendant.

Nos. 76 C 3182, 77 C 2042

ORDER

Plaintiffs Sherry Eirhart and the Equal Employment Opportunity Commission brought this action against defendant, Libbey-Owens-Ford Co. (the Company), charging that the Company imposes minimum height and weight standards upon applicants for employment which discriminate in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-*et seq.*[1] The Company has moved for summary judgment against both

[1] Plaintiff Eirhart stands in the same position as the Commission since the defense urged by the Company in its motions and in its response to the Commission's motion is equally applicable to her cause of action. Additionally, in her memorandum opposing defendant's motion for summary judgment, plaintiff Eirhart repeats in abbreviated form the arguments of the Commission. The discussion in this case, accordingly, while referring mostly to the EEOC and the Company, applies equally to her.

plaintiffs. The Commission has also made a motion for summary judgment.[2]

The facts are simple and apparently not in dispute. On March 13, 1970, the EEOC notified Libbey-Owens-Ford that, after an investigation and attempted conciliation, (1) an impasse had been reached, (2) individual complainants were to be given right to sue letters, and (3) the matter was being referred to the Attorney General for possible action under § 707 of Title VII, 42 U.S.C. § 2000e-6 (1976). The investigation by the Commission dealt only with employment practices which had been complained of to the Commission and did not deal with hiring standards. The matter was referred to the Attorney General pursuant to § 705(g)(6) and the Justice Department conducted its own investigation, based on the referral. The Justice Department filed a complaint against the Company on July 20, 1970, including a charge of discriminatory hiring practices based on height and weight, in writing as of February 4, 1970. Negotiations between the Company and the Justice Department ensued, and resulted in a Consent Order being entered on February 3, 1971 by the United States District Court for the Northern District of Ohio, Western Division, in *United States v. Libbey-Owens-Ford Co.*, 3 EPD ¶ 8052 (1971). Subsequently, on November 20, 1974, the Commission was substituted on its own motion as party-plaintiff in place of the Attorney General, pursuant to § 707(d), 42 U.S.C. § 2000e-6(d), which transferred the functions of the Attorney General to the EEOC.[3]

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[2] The EEOC also moved to strike the Company's second affirmative defense of laches. Because of the determination of the case, there is no need to reach this issue.

[3] 42 U.S.C. § 2000e-6(d) provides: "Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General as appropriate."

Paragraph XI-A of the Consent Order provides:

> Hiring in all Toledo area plants shall be carried out in a non-discriminatory basis. Minimum physical and non-physical requirements for entry level jobs, which were in writing as of February 4, 1970, shall continue to be applicable to both males and females seeking employment with the Company, except that the minimum weight requirement for females shall be 110 pounds.

These standards include the 5'4" height requirement and have been in effect at the defendant's Ottawa, Illinois plant since December 1970. Plaintiffs contend that these standards discriminate against women and that the defendant has not demonstrated their job relatedness. The defendant does not address those issues, and relies instead on the Consent Order, maintaining that § 713(b), 42 U.S.C. § 2000e-12(b) gives it a real and complete immunity against the present Title VII actions.[4] The question before the Court is whether the Consent Order constitutes "a written interpretation or opinion of the Commission" within the meaning of the statute and upon which the Company could rely in good faith as a defense to the instant Title VII actions.

It is clear that the motivation of the Company in initially formulating and imposing the height and weight requirements is irrelevant. "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation'." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975), quoting *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971). Congress has, however,

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[4] 42 U.S.C. § 2000e-12(b) provides: "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on any written interpretation or opinion of the Commission. . . ."

recognized a narrowly defined good faith defense. While narrowly defined, that defense gives complete immunity for employer conduct falling with § 713(b). Courts are not free to expand the immunity beyond the statute. *Albemarle*, 422 U.S. at 423, n.17.

On the issue of whether the Consent Order might be relied upon to give immunity under § 713(b), the arguments of the parties take essentially the same analytical steps. The first step is to determine whether the Consent Order is a "written interpretation or opinion" within the meaning of the statute. If it is, the next step is to determine whether it is "of the Commission." Finally, if both of these are determined affirmatively, the third determination to be made is whether a Consent Decree entered in Ohio, explicitly binding and applying directly only on the Company's Toledo area plants, may be relied upon by the Company in its Ottawa, Illinois plants. The Commission would have the Court reach a negative answer at each step; the Company argues for an affirmative answer to each proposition.

At the first step, whether the Consent Order can be considered a "written interpretation or opinion," the EEOC points to its guideline 29 C.F.R. § 1601.33 contending under that guideline *only* an "opinion letter" signed by the General Counsel on behalf of the Commission or matter published in the Federal Register can meet the statutory language. Since a consent order clearly falls under neither of those categories, the Commission contends that it cannot be a written interpretation or opinion and cannot give rise to the statutory good faith reliance defense.

While guidelines promulgated by administrative agencies construing the statutes with whose administration they have been entrusted by Congress are often afforded great deference by the courts, that deference is a result only of their persuasive power of reasoning "as a body of experience and informed judgment." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1949). When Congress enacted Title VII, it did not confer upon the EEOC authority to promulgate regulations which would have the force of

law. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). "Without that authority all rules on agency issues are necessarily interpretative rules regardless of their impact . . . and even though courts often defer to an agency's interpretative rule they are always free to choose otherwise." *Joseph v. U.S. Civil Service Commission*, 554 F.2d 1140, 1154, n.26 (D.C. Cir. 1977); *General Electric Co. v. Gilbert, supra.*

Accordingly, 29 C.F.R. § 1601.33 is not binding on this Court.[5] The Commission, however, cites cases indicating that 29 C.F.R. § 1601.33 has been given deference by the courts. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971) and *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970), both held that the guideline is a reasonable interpretation of § 713(b). The Commission relies particularly heavily on the Seventh Circuit case of *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971). In this case, the Commission contends, the Seventh Circuit did more than "defer" to the guideline: it held that the guideline *must* be complied with to constitute a written interpretation or opinion under the statute.

Robinson and *Local 189* did not deal with anything as formal as a consent order. *Robinson* concerned a "no reasonable cause" determination by the EEOC that was held not to be a written interpretation or opinion. And *Local 189* involved an oral statement by someone other than the General Counsel of the Commission.

Sprogis, on the other hand, is more on point. It dealt with "a so-called 'letter of opinion' of the Commission's General Counsel" which was held to fall within 29 C.F.R. § 1601.33. At issue in that case was whether the document in question fell within the guideline. Despite the Commission's contention to the contrary, the court

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[5] The notice published in the Federal Register, 35 F.R. 18692, on December 9, 1970 is similarly entitled only to consideration as a factor in making the determination of the first step and is not binding.

did not require that the guideline be adhered to in all cases. Rather, the court was concerned, as was Judge Wisdom in *Local 189, supra,* that a broader reading of the language in § 713(b) "might bind" the Commission to informal or unapproved opinions volunteered by members of its staff." *Sprogis,* 444 F.2d at 1200. The court held that the particular "letter of opinion" in that case ran afoul of those dangers and did "not indicate a considered legal judgment approving the [employment] policy under the Act." *Sprogis,* 444 F.2d at 1201.

By contrast, the Consent Order in the present case presents none of the dangers which concerned the court in *Sprogis,* and does constitute a "considered legal judgment" approving the employment policy. The Consent Order is neither informal nor unapproved. It is not an internal agency memorandum. It is rather an order entered into by the United States District Court for the District of Ohio, and binding upon the parties. Assuming for the moment that the EEOC was a party, the order would represent an agreement entered into by an authorized officer of that agency. Even without such an assumption, the Consent Order constituted the considered legal judgment of both the Department of Justice and the District Court, approving, indeed mandating, the height and weight standards at the Company's Toledo area plants. The Consent Order in this case was published in full in Employment Practice Decisions, a reporter which reports the full official texts of leading federal and state decisions in the area. All of these factors minimize, if not eliminate, the problems perceived by the *Sprogis* court. Despite that court's use of 29 C.F.R. § 1601.33 in that case, the guideline is not binding on this Court in this case.

At least one court has held that a Consent Order can be a written interpretation or opinion. *EEOC v. American Telephone & Telegraph Co.,* 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1976), *affd.* 556 F.2d 167 (3d Cir. 1977.)[6] The parties spend a good deal of time debating

[6] This "holding" is a two-sentence footnote which was not decisive in the case.

the applicability of that case to the present case, but both agree that the holding in that case was appropriate. The Commission's agreement to this point is at odds with its contention that only those items specified in 29 C.F.R. § 1601.33 are written interpretations or opinions. Despite the Commission's emphasis on the "accompanying documents" in the case, the fact remains that the Consent Order was held to satisfy the statutory requirement.

There is no reason why a consent order should not fulfill the requirements of § 713(b). Such an order is entered into in open court. It is binding on the parties, and if the EEOC is one of those parties, is binding on the EEOC. Even more than an "opinion letter," an agreement to a consent order by the EEOC represents a formal agency approval of the policies embodied in the order. The Consent Order entered on February 3, 1971, therefore, constitutes a written interpretation or opinion within the meaning of § 713(b).

This being so, it becomes necessary to make a determination of the second step, whether the written interpretation or opinion, the Consent Order, is "of the Commission."

The EEOC investigation, the failed conciliation attempt, the referral by the EEOC of the matter to the Attorney General, the filing of the complaint by the Attorney General, and the entering of the Consent Order all occurred prior to the 1972 amendments to Title VII. At that time, the Commission had no authority to institute suits in the courts. Its function was limited by the Act to "investigation of employment discrimination charges and informal methods of conciliation and persuasion." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. § 55, 359 (1977). Litigation was reserved to private individuals under § 706 and the Attorney General under § 707. Section 705(g)(6) gave the Commission the power to refer matters to the Attorney General "for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters." In a very real sense, then, the

Attorney General acted as an extension of the Commission in cases referred to that office under § 705(g)(6). The Attorney General, when it desired, picked up matters where the Commission had left off, matters referred to it by the Commission, and continued with them to fruition. While the Supreme Court in *Occidental Life*, 432 U.S. at 359, states that the "failure of conciliation efforts terminated the involvement of the EEOC," that language refers only to the Commission's involvement in a formal way. The Commission still had the power under the statute to participate in and have an impact upon the instigation and progress of civil actions brought by the Attorney General.

The referral in the present case was a referral from the EEOC to the Attorney General pursuant to § 705(g)(c).[7] The Attorney General accepted the Commission's recommendation and instituted the civil action that resulted in the Consent Order of February 3, 1971.

The Commission contends that the action by the Attorney General in filing the complaint and in negotiating the Consent Order was an independent action of the Department of Justice which did not involve the EEOC. It points out that the complaint of July 20, 1970 names the United States as plaintiff and states that the action was brought by the Attorney General on behalf of the United States. The name of the EEOC is not mentioned anywhere in the complaint. Jurisdiction is founded in the complaint on § 707(6)(b), which gives the Attorney General the authority to file a civil action. While these facts could lead to the conclusion urged by the EEOC that it was not involved in the complaint or the Consent Order, the facts are also consistent with the proposition that the Attorney General was acting as an

[7] The March 19, 1970 letter, with the EEOC letterhead, from the Commission's General Counsel to the Company stated, "This is to advise that this office, pursuant to authority granted under Section 705(g)(6) of Title VII of the Civil Rights Act of 1964, has referred the above cause to the Attorney General with the recommendation for the institution of a civil action under Section 707 of the Title."

extension of the Commission, on a referral from the Commission. The Department of Justice was the only office under Title VII with the authority to bring the action. It is natural that it should be the plaintiff in that circumstance. Since only the Attorney General could bring the action, jurisdiction must necessarily have been predicated upon the statute giving him the authority to do so. It is also natural that the EEOC would not be named in the complaint. As the Supreme Court noted in *Occidental Life, supra,* the Commission's formal involvement in the case was ended when it referred the case pursuant to § 705(g)(6). But that does not mean that the Commission was no longer involved. Under the statute, it could still have had an impact on the case through its power to advise, consult and assist. The EEOC has cited no authority and given no examples to demonstrate that the absence of the name of the EEOC from a complaint means that the EEOC was not involved.

The best argument made by the Commission that the Consent Order was the result of actions taken by the Attorney General and not the Commission was that the complaint of July 20 included an allegation that the hiring standards, identical to those at issue in this case, were discriminatory while the investigation referred to the Attorney General by the Commission made no mention of the hiring standards. This would seem to indicate an independent investigation by the Justice Department and, therefore, an independent action. But despite this appearance of non-involvement, at least on this point, the Commission concedes that it was bound by the Consent Order,[8] including the height and weight hiring standards. Thus, while the Commission has not necessarily "ratified" the Consent Order as contended by

[8] "There is no doubt that the Commission was bound to defer to the terms of the Ohio Consent Order during its term, as to the Defendant's Toledo area plants. Therefore, in issuing its 'no cause' determination, the Commission's Cleveland District Office cited the Consent Order as the sole reason for its findings." Plaintiff's Reply to Defendant Memorandum Opposing Plaintiff's Motion for Summary Judgment, p. 6.

the Company, it has placed itself in the position of a party to the Consent Order. Only a party is bound by a judgment. 1B Moore's Federal Practice ¶0.411.

In fact, the Commission is a party to the Consent Order, though it was not a party when it was entered in 1971. On November 20, 1974, the District Court for the Northern District of Ohio granted the Commission's motion and ordered that the Commission be substituted as party-plaintiff for the Attorney General in the original unit which resulted in the Consent Order. This action was taken pursuant to the 1972 amendments to Title VII which provided for the transfer of the Attorney General's function in the area to the EEOC. 42 U.S.C. § 2000e-6(c), (d); § 707(c), (d) of Title VII. Section 707(d) provides that "upon the transfer of functions. . . . all court orders and decrees shall remain in effect." That, of course, is true of the Consent Order in this case.

The Consent Order was a direct result of the investigation by the Commission and the referral of the case to the Attorney General. The Commission concedes that it is bound by that Consent Order, and is, of particular importance, a party to it. In light of these circumstances, the logical conclusion is that the Consent Order, which is a written interpretation or opinion, is "of the Commission."

Since the Consent Order is a "written interpretation or opinion of the Commission" within the meaning of § 713(b), it becomes necessary to determine whether the Company was justified in relying on it in imposing the height and weight standards in its Ottawa plants. The Consent Order, by its own terms, applies only to the Company's Toledo area plants. Thus, it is only binding upon the EEOC, as party-plaintiff as of 1974, and upon the Company in the Toledo area. Both parties were free to disregard it in other places.

The Commission contends that this fact separates the present action from the Consent Order and denies the Company the defense embodied in § 713(b). The Company, on the other hand, contends that other federal

agencies have approved of the standards included in the Consent Order in other places than Toledo and that the need for continuity of action for companies reporting to various federal agencies should permit trans-geographic application of the Consent Order. The Company further contends that a contrary decision would result in different hiring standards being applied in different places, causing inconsistency within the Company and potentially engendering further suits based on that inconsistency.

That other federal offices or agencies have approved the height and weight standards is irrelevant to a Title VII action. Each office or agency considers the standards as they fit into its regulatory sphere and not as an interpretation of Title VII. "[R]eliance upon Government approval or participation in the formulation of the employment practice is not generally a defense in a Title VII suit." *Stevenson v. International Paper Co.*, 516 F.2d 103, 111 (5th Cir. 1975).

But this does not mean that the Consent Order cannot be the basis of a defense in this case. The issue is not whether the Order is binding in Ottawa, or whether the Company might rely on approval by *other* Governmental agencies. Rather the issue is whether the Consent Order, being a written interpretation or opinion of the Commission, could be relied upon by the Company. Section 713(b) contains no requirements that the written interpretation or opinion be binding upon anyone; it makes no mention of geographic limitations. Immunity is given for good faith *reliance*. The effect is the same as it would be had the Commission sent an opinion letter to the Company, and the Company had relied upon that.

Although the Company was bound by the Consent Order only in the Toledo area, it applied and continues to apply hiring standards identical to those in the Consent Order at its Ottawa facility. The Consent Order states that "the minimum weight requirement for females shall be 110 pounds." As is evident from the reference to this as an "exception", this weight standard

was not included in the original standards in writing as of February 4, 1970. That the Company applies standards in Ottawa identical to those in the Consent Order when it is not bound to do so indicates reliance on the Order.[9]

There is good reason to permit reliance on an Order applying to a different geographic area, especially when the reliance is by the same entity subject to the Order as in the present case. It promotes consistency in hiring standards throughout the corporate structure. More importantly, a written interpretation or opinion of the Commission indicates the Commission's belief that the standards are appropriate under Title VII. In the present case, the Consent Order indicates the Justice Department's and the District Judge's opinion that the standards are appropriate. Parties should not be subject to differing interpretations of Title VII simply because the location of their places of operation are in different geographic areas. The third step in the analysis, whether the Company was justified in relying on the Ohio Consent Order in implementing the height and weight standards in Ottawa, is answered in the affirmative. The Company was justified in its reliance.

Since there is no genuine issue of material fact, and since the Company relied in good faith on a written interpretation or opinion of the Commission, 42 U.S.C. § 2000e-12(b), the Company's motions for summary judgment against the plaintiffs Sherry Eirhart and the Equal Employment Opportunity Commission are granted.

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[9] There are other indications of reliance. Before negotiations began with the Justice Department, the Company apparently had an even greater weight requirement. Exhibit B of Defendant's Motion to Summary Judgment. That earlier requirement has not been employed at Ottawa, despite not being bound to use the lesser 110 pound standard there. Additionally, the identical height and weight standards have been used in the Company's affirmative action programs. Exhibit G of Defendant's Motion for Summary Judgment.

Plaintiff's motion to strike defendant's second affirmative defense is moot, as is the Commission's motion for summary judgment.

ENTER:

/s/ Stanley J. Roszkowski, Judge
United States District Court

Dated: June 1, 1979

Supreme Court, U. S.
FILED
JUL 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1801

LIBBEY-OWENS-FORD COMPANY,

Petitioner,

v.

SHERRY EIRHART and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT EIRHART IN OPPOSITION

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BRIEF OF SHERRY EIRHART IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Sherry Eirhart files the following in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Libbey-Owens-Ford requires that each of its production workers be taller than five feet four inches. Respondent Sherry Eirhart is five feet two and one-half inches tall. In August of 1971, she applied for employment with petitioner, and although otherwise qualified, respondent was denied employment because of petitioner's minimum height requirement.

Respondent filed timely discrimination charges with the Equal Employment Opportunity Commission, complaining that petitioner's minimum height requirement was discriminatory in its application to her as a woman. On July 8, 1976, respondent received notification of her right to sue from the EEOC, and timely filed her complaint in the district court.

The district court consolidated respondent Eirhart's complaint with a related action brought by the EEOC. Petitioner moved to dismiss on the ground that its five foot four inch minimum height requirement had been immunized from further challenge by a 1971 consent decree in a case involving the EEOC and petitioner's plant in Toledo, Ohio. The district court accepted this argument (Pet.App. 10a-22a), but the court of appeals reversed. (Pet.App. 1a-9a.)

SUMMARY OF ARGUMENT

The question of whether a consent decree entered into between the EEOC and an employer bars a private action was recently resolved by this Court in *General Telephone Company* v. *EEOC,* 48 U.S.L.W. 4513 (May 12, 1980), in accord with the decision of the Seventh Circuit in this case.

ARGUMENT

In *General Telephone Company* v. *EEOC,* 48 U.S.L.W. 4513 (May 12, 1980), this Court held that

> it would be [in]consistent with the remedial purpose of [Title VII] to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. Id. at 4517.

This holding is dispositive of the questions presented in the petition for writ of certiorari.

1. Petitioner argues that the consent decree it entered into with the EEOC in litigation involving petitioner's Toledo, Ohio plant provides it with immunity from any claims of employment discrimination thereafter. (Pet. 10-19.) As the court of appeals stated (Pet.App. 8a), this argument "fails to explain how [respondent], who was neither a party to the Ohio case nor in privity with a party, can be bound by the Ohio decree." Moreover, petitioner's argument is contrary to the reasoning applied by this Court in *General Telephone Company, supra,* and the holding of that case that litigation by the EEOC only effects a private right of action when an individual explicitly relinquishes his (or her) right to bring a separate action. 48 U.S.L.W. at 4517 & n.15.

2. Nor is there any conflict between the decision of the court of appeals in this case and the decision of the district court in *EEOC* v. *American Tele. & Tel. Co.*, 419 F.Supp. 1022 (E.D.Pa. 1976). (Pet. 19-22.) As the court of appeals noted (Pet.App. 7a) the AT&T case involved

> two documents which were entitled "opinion letters," were signed by the General Counsel of the EEOC, and stated that they were written "on behalf" of the EEOC.

While such "opinion letters" with their reasoned assertion of the agency's official position may well create immunity under Section 713 of Title VII, 42 U.S.C. §2000e-12, they are far different from the consent decree entered into by petitioner and the EEOC compromising their differences in Ohio.

CONCLUSION

For the reasons above stated, it is respectfully submitted that certiorari be denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OCTOBER TERM, 1979

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether a 1971 consent decree, which terminated an employment discrimination action brought against petitioner by the Department of Justice and permitted petitioner to impose certain height and weight requirements for employment as its Toledo, Ohio manufacturing plants, constitutes a "written interpretation or opinion" of the Equal Employment Opportunity Commission within the meaning of Section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), and therefore immunizes petitioner from liability for having imposed the same height and weight restrictions at its Ottawa, Illinois facilities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 616 F. 2d 278. The opinion of the district court (Pet. App. 10a-22a) is reported at 482 F. Supp. 357.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1980. The petition for a writ of certiorari was filed on May 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1976 respondent Sherry Firhart brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that she had been discriminated against because of certain height and weight qualifications that petitioner Libbey-Owens-Ford Company ("Ford") had imposed for employment at its Ottawa, Illinois facilities. Thereafter, in May 1978, the Equal Employment Opportunity Commission ("Commission") filed an action challenging the same height and weight requirements. Both actions were brought in the United States District Court for the Northern District of Illinois, and they were consolidated in September 1978 (Pet. App. 3a).

On cross-motions for summary judgment, Ford asserted that it was immune from liability under Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), on the ground that it had maintained the restrictions in reliance upon a 1971 consent decree concluding another Title VII suit that the Justice Department had brought concerning Ford's Toledo, Ohio plants. The Toledo decree permitted the use of certain minimum height and weight requirements at those plants (Pet. App. 2a, 12a).

The Toledo lawsuit resulted from a charge of employment discrimination that had been filed with the Commission in 1968. The charge alleged that female employees had been restricted to two departments containing lower paying jobs and that seniority lists, that were segregated on the basis of sex, were being maintained at Ford's "Plant 8" in Toledo. The Commission found reasonable cause to believe that the charge was true, and ultimately unsuccessful conciliation efforts followed. On February 4, 1970, while conciliation negotiations were on-going, Ford imposed minimum height and weight requirements for entry level jobs at Plant 8 (Pet. App. 2a).

The Commission, whose statutory authority was then limited to investigation and conciliation, referred the case to the Justice Department after the conciliation efforts had failed.[1] On July 20, 1970, the Department filed a lawsuit alleging that Ford maintained a pattern and practice of discrimination against women at its Toledo, Ohio plants. The complaint did not refer to height and weight restrictions. *United States* v. *Libbey-Owens-Ford Co.*, No. C-70-212 (N.D. Ohio) (Pet. App. 2a, 8a). On February 3, 1971, the parties entered into a twenty-one page consent decree which provided special transfer, seniority and promotion rights for women employees at Plant 8 (Pet. App. 9a). The consent decree also contained a general provision concerning hiring at "all Toledo area plants." The provision required that hiring be "nondiscriminatory" but allowed Ford to retain a 5'4"

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[1]On November 20, 1974, more than three years after the decree was entered, the Commission was substituted to monitor compliance with the Toledo consent decree. The substitution occurred pursuant to the 1972 amendments to Title VII, which transferred the functions of the Attorney General to the Commission. Sections 707(c) and 707(d) of Title VII, 42 U.S.C. 2000e-6(c) and 42 U.S.C. 2000e-6(d) (Pet. App. 7a).

height restriction and a weight restriction "for females" of 110 pounds (Pet. App. 2a-3a).[2] In December 1970, prior to the entry of the consent decree, Ford had imposed the same height and weight restrictions at its Ottawa, Illinois plants (Pet. App. 3a).

Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), provides that "no person shall be subject to any liability * * * if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *." Since the enactment of Title VII, the Commission's regulations have consistently construed Section 713(b) to provide that only "a letter entitled 'opinion letter' and signed by the General Counsel" or "matter published and specifically designated * * * in the Federal Register" will constitute such a "written interpretation or opinion of the Commission." 29 C.F.R. 1601.33 (formerly 29 C.F.R. 1601.30; 30 Fed. Reg. 8409 (1965)).

The district court granted Ford's motion for summary judgment, however, holding that the hiring requirements provision of the Toledo consent decree constituted a "written interpretation or opinion of the Commission" within the meaning of Section 713(b) of Title VII (Pet. App. 10a-22a). The court noted that "[t]he Consent Order, by its own terms, applies only to the Company's Toledo area plants," but concluded that the company was

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[2]The decree provided in pertinent part that "Hiring in all Toledo area plants shall be carried out in a non-discriminatory basis. Minimum physical and non-physical requirements for entry level jobs, which were in writing as of February 4, 1970, shall continue to be applicable to both males and females seeking employment with the Company, except that the minimum weight requirement for females shall be 110 pounds" (Pet. App. 12a).

immune from liability because it could justifiably rely on the decree in imposing the restrictions at its Ottawa, Illinois plants (Pet. App. 19a).

The court of appeals reversed, holding that "[i]t would not be appropriate for this Court to expand the narrowly drawn Congressional grant of immunity contained in Section 713(b) to include * * * a [consent] decree" (Pet. App. 4a). The court noted that "[s]uch a compromise and product of bargaining skill between two parties cannot be deemed to be an 'order or opinion' of either of the parties" (Pet. App. 4a).[3] Moreover, the Commission's regulations defining a binding order or opinion were reasonable and should have been followed by the district court (Pet. App. 6a-7a).

ARGUMENT

The decision below warrants no further review; it is correct and consistent with the construction adopted by every court of appeals that has considered the question presented.

1. Since 1965, the Commission has recognized that agency expressions of "opinion" may take various forms. The Commission has consistently and expressly provided in its regulations, therefore, that only those "opinions" that are contained in officially designated opinion letters of the Commission's general counsel or in other materials published and so designated in the Federal Register, will provide the requisite basis for a Section 713(b) defense. See 29 C.F.R. 1601.33. Because good faith reliance on a Commission opinion provides a complete defense under Section 713(b), every court of appeals that has considered

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[3]The court of appeals also concluded that "any legal effect of the [consent] order on the EEOC would be * * * relevant only to a *res judicata* or collateral estoppel argument" (Pet. App. 8a). No such argument was made in the court of appeals.

the question has determined that the defense may be invoked only on the basis of opinions conforming to the Commission's regulation. See *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1200-1201 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (General Counsel "letter of opinion" which did not meet the requirements of the Commission's guideline not a proper basis for a Section 713(b) defense); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801 (4th Cir.), cert. denied, 404 U.S. 1006 (1971) (determination of "no reasonable cause" not an interpretation under Section 713(b)); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980, 997 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (letters and statements by Commission officials not a basis for a Section 713(b) defense). See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 423 n.17 (1975) (Section 713(b) provides "a complete, but very narrow, immunity"). As the Seventh Circuit explained in *Sprogis* v. *United Air Lines, Inc.*, *supra*, 444 F. 2d at 1200, the Commission's regulation "reasonably confines reliance justified under Section 713(b) to considered official expressions of opinion taking two specifically defined forms."

2. The court of appeals, relying on this Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), correctly concluded that a consent decree cannot be deemed an interpretation or opinion of the law by either party (Pet. App. 4a). As this Court explained in *Armour*, *supra*, a consent decree is a pragmatic compromise whose scope must be discerned within its four corners, and whose terms are the product of relative "bargaining power and skill." Moreover, consent decrees "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce * * *." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975).

Petitioner's reliance on a footnote in the district court's opinion in *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1976), aff'd, 556 F. 2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978), is misplaced. That footnote does not establish that a consent decree will automatically constitute a binding interpretation providing nationwide immunity as to every kind of employment practice mentioned in the decree.[4] As part of the settlement in *American Telephone*, the employer negotiated for and obtained "opinion letters" from the Commission's general counsel, in which the Commission stated that certain of the decree's remedial provisions were lawful and that the letters could be relied upon under Section 713(b). Accordingly, the district court noted that the consent decree "and its accompanying documents" constituted an interpretation or opinion of the Commission. 419 F. Supp. at 1055 n.34. Here Ford did not bargain for or receive separate opinion letters upholding its use of height and weight restrictions nationwide. Cf. 29 C.F.R. 1601.31, 1601.32.

Moreover, Ford disregards the critical fact that the Toledo consent decree specifically provides that it is applicable only to Ford's "Toledo area plants." As Ford properly notes, the Toledo decree "reflects a thorough consideration * * * [by] the U.S. Department of Justice and [Ford] of the potential situations to which it will apply * * *" (Pet. 15). Contrary to Ford's argument, therefore, the present suit, which covers only Ford's Illinois plants, does not subject the company to potential liability "based on the very employment procedures

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[4]It would be particularly anomalous, in light of this Court's subsequent decision in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), if the Toledo consent decree were deemed a Commission opinion that the employment practices mentioned therein are categorically "in conformance with Title VII" (Pet. 16).

mandated in [the] Consent Order" (Pet. 19).[5] Indeed, Ford's argument is a transparent attempt to expand the operation of the 1971 consent decree and take advantage of certain terms, which Ford now considers to be favorable, by applying those terms to its nationwide activities, rather than to the limited local area that was the subject of the bargaining that led to that decree. Just as this Court has refused to extend consent decrees beyond their terms at the request of the government, see, e.g., *United States* v. *Armour & Co.*, *supra*, the court of appeals properly refused to extend the Toledo consent decree beyond its terms through the use of Section 713(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

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[5]Contrary to petitioner's assertion (Pet. 13 n.2), the decision below does not subject petitioner to conflicting or inconsistent judgments. This case involves two Ottawa, Illinois plants; the 1971 consent decree applies only to the Toledo, Ohio plants.

Supreme Court, U. S.
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No. 79-1801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LIBBEY-OWENS-FORD COMPANY,

Petitioner,

vs.

SHERRY EIRHART and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

REPLY OF PETITIONER, LIBBEY-OWENS-FORD COMPANY, TO BRIEF OF RESPONDENT, SHERRY EIRHART

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REPLY OF PETITIONER, LIBBEY-OWENS-FORD COMPANY, TO BRIEF OF RESPONDENT, SHERRY EIRHART

In her Brief in opposition to the Petition for Writ of Certiorari, respondent Sherry Eirhart states that "the question of whether a consent decree entered into between the EEOC and an employer bars a private action was recently resolved by this Court in *General*

Telephone Company v. EEOC, 48 U.S.L.W. 4513 (May 12, 1980), in accord with the decision of the Seventh Circuit in this case." (Eirhart Br. p. 2). However, the first paragraph of this Court's opinion in *General Telephone* states that "The issue in this case is whether the . . . (EEOC) may seek class-wide relief under §706(f)(1) of Title VII of the Civil Rights Act of 1964 (Title VII) without being certified as the class representative under Rule 23 of the Federal Rules of Civil Procedure." Nowhere does this Court even touch upon the issue raised in Libbey-Owens-Ford's Petition, whether a consent order, such as the Consent Order of February 3, 1971, is an interpretation or opinion of the EEOC so as to provide a defense to petitioner, Libbey-Owens-Ford, under §713(b) of Title VII.

This Court's holding in the *General Telephone* case is that Rule 23 does not apply to EEOC actions. The *General Telephone* case did not involve actions and procedures approved by the EEOC and contained in a consent order entered into with the EEOC, directing that the specific employment procedures be utilized by an employer. The *General Telephone* case did not address the issue of the substantive aspects of a consent judgment with the EEOC, i.e., whether a consent order, such as the Consent Order of February 3, 1971, directing an employer to utilize a specific hiring procedure approved by the EEOC, constitutes an interpretation or opinion of the EEOC as to that specific hiring procedure so as to provide a defense under §713(b) to the employer. It is submitted that the *General Telephone* case is not, therefore, as respondent Sherry Eirhart suggests, on page 2 of her Brief, "dispositive" of the issues raised in Libbey-Owens-Ford's Petition.

This Court should grant petitioner, Libbey-Owens-Ford's Writ of Certiorari to the Court of Appeals for the Seventh Circuit and decide the issues raised therein.

Respectfully submitted,

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